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Supreme Court, U.S.
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No. _____

In the
SUPREME COURT OF THE UNITED STATES

October Term, 1997

Commerce Bank, N.A., *Petitioner,*

v.

DiMaria Construction, Inc., *Respondent.*

On Petition for a Writ of Certiorari to the
Superior Court of New Jersey, Appellate Division

PETITION FOR A WRIT OF CERTIORARI

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75 pp

QUESTION PRESENTED

Whether Petitioner's Due Process rights were violated when the New Jersey State Courts refused to decide a contractual issue, and referred the matter to arbitrators, who were not properly empowered to make a judicial determination.

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IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1997

Commerce Bank, N.A., *Petitioner*,

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DiMaria Construction, Inc., *Respondent*.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION

Commerce Bank, N.A. respectfully petitions for a writ of certiorari to review the judgment of the Superior Court of New Jersey, Appellate Division.

OPINIONS BELOW

The Supreme Court of New Jersey denied a Petition for Certification without opinion. That Order is reported at 151 N.J. 73, 697 A.2d 546 (1997). (Reproduced at App., *infra*, 46a). The Opinion of the Superior Court of New Jersey, Appellate Division, is reported at 300 N.J.

Super. 9, 692 A.2d 54 (1997). (Reproduced at App., *infra*, 18a-45a). The opinion of the Superior Court of New Jersey, Law Division, Camden County was not reported. (Reproduced at App., *infra*, 1a-12a).

JURISDICTION

The Supreme Court of New Jersey denied certification on June 30, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. §1257.

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

Petitioner relies upon U.S. Const. amend. XIV, §1:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person

within its jurisdiction the equal protection of the laws.

There are no statutory provisions involved in this request.

STATEMENT

I. Introduction

Commerce Bank, N.A. ("Commerce Bank") retained DiMaria Construction, Inc. ("DiMaria") to oversee and manage the construction of an office building located in Mt. Laurel, New Jersey ("the Project"). There were two separate contracts signed by the parties. After Commerce Bank grew weary of long delays and poor workmanship, it terminated DiMaria from the Project.

As a result of the termination, the parties engaged in litigation in both the New Jersey state courts and in an American Arbitration Association proceeding. The construction contracts provided for arbitration of

disputes, but only if certain conditions precedent were met. The conditions were not met, but the New Jersey state courts rejected Commerce Bank's arguments to stop the improper arbitration. The arbitrators then rendered an award which did not follow state law and deprived Commerce Bank of its property without due process of law in violation of the Fourteenth Amendment to the United States Constitution.

II. Procedural History

The parties' agreement expressly stated that submission of a dispute to the project Architect was a condition precedent to a demand for arbitration:

> 4.3.2. *Decision of Architect.* Claims, including those alleging an error or omission by the architect, shall be referred initially to the architect for action as provided in Paragraph 4.4. A decision by the architect, as provided in Subparagraph 4.4.4 *shall be required as a condition precedent to arbitration or litigation of a claim between the contractor and owner as to all such matters arising prior to the date final payment is due.* (Emphasis added).

DiMaria did not submit a claim to the Project's Architect prior to submitting a Demand for Arbitration with the American Arbitration Association on October 21, 1994. Commerce Bank filed a response to the Demand for Arbitration on November 14, 1994. On January 20,

1995, Commerce Bank filed a Verified Complaint for Declaratory Judgment and Injunctive Relief in the Superior Court of Camden County. Commerce Bank sought to enjoin the arbitration because DiMaria failed to meet the conditions precedent, as required by the agreements. At that time, DiMaria was pressing to have the arbitration hearing begin in either January or February of 1995. The Honorable Francis J. Orlando, Jr. denied Commerce Bank's request for a Temporary Restraining Order but set March 10, 1995, as a date for DiMaria to show cause why an injunction, staying the arbitration should not issue.

On February 9, 1995, Commerce Bank filed an Amended Complaint regarding its request for stay of the arbitration. DiMaria filed a Motion to Dismiss Commerce Bank's Complaint, and also filed a Cross-Motion for Attorneys' Fees. On March 10, 1995, Judge Orlando

dismissed four of the five counts of Commerce Bank's Amended Complaint and refused to stay the arbitration proceedings. (App., *infra*, 1a-12a). Judge Orlando dismissed Commerce Bank's allegations regarding the stay of arbitration, because he believed that the issue of whether DiMaria met the requisite conditions precedent for a demand for arbitration should not be decided by the Court, but rather by the arbitrators themselves. Judge Orlando's actions violated petitioner's Due Process rights and denied Commerce Bank its day in court.

Commerce Bank filed a Motion for Reconsideration which was denied on May 12, 1995. Commerce Bank also filed a Motion for Leave to Take an Interlocutory Appeal of the Court's Order, which was denied by the Appellate Division on or about June 22, 1995.

The arbitration proceedings commenced on March 13, 1995. Testimony was heard on twenty (20) days

between March and August, 1995. On September 26, 1995, the arbitrators found against Commerce Bank and awarded DiMaria $205,270.00 under the Agreement. The arbitrators also awarded DiMaria $49,650.00 as a result of other damages DiMaria allegedly suffered. The arbitrators denied Commerce Bank's counterclaim in its entirety. The arbitrators further held that attorneys' fees and administrative expenses should be borne by Commerce Bank, with an award of $68,264.00 to DiMaria for its attorneys' fees. The arbitrators also awarded interest at ten percent (10%) on the entire Award. The Arbitrators erroneously determined that the "conditions precedent were not a factor." (App., *infra*, 14a).

On October 5, 1995, Commerce Bank filed a Motion, Verified Complaint and Order to Show Cause, seeking to vacate and/or modify the Arbitrators' Award.

DiMaria filed an Answer to the Complaint and Motion and filed a Cross-Motion to Confirm the Award. DiMaria also filed a cross-motion seeking attorneys' fees for the expense of responding to Commerce Bank's Motion to Vacate and/or Modify the Award.

On February 27, 1995, the Honorable Marvin Schlosser confirmed the Arbitrators' Award and entered judgment in DiMaria's favor in the amount of $358,651.26, and also held that the interest would continue to accrue at ten percent (10%) until the full award was paid.

On December 4, 1995, Judge Orlando dismissed Count V of Commerce Bank's Complaint regarding the stay of the arbitration proceedings. It also denied DiMaria's Cross-Motion for Attorneys' Fees. Commerce Bank filed a Notice of Appeal from that decision on

January 16, 1996. DiMaria filed a Notice of Cross-Appeal from the Judge's Order denying its attorneys fees.

On March 1, 1996, Commerce Bank also filed a Notice of Appeal from Judge Schlosser's Order of February 27, 1996. On March 11, 1996, DiMaria filed a Cross-Motion from Judge Schlosser's Order as well. The Appellate Division consolidated both appeals.

In its appeal, Commerce Bank asserted:

> Whether the Court would have rendered a different decision than the arbitrators is immaterial. It has been held that a Court's refusal to consider the issue is *per se* irreparable, *see*, *PaineWebber*, 921 F.2d at 515. The United States Supreme Court, and the Courts of New Jersey, have uniformly held that a party is entitled to judicial determination as to the scope of the arbitrators' authority. The only exception is when the parties expressly agree to allow the arbitrators to decide arbitrability. *First Options*, --- U.S. ---, 115 S.Ct. at 1924. Commerce Bank did not agree to grant the arbitrators this authority, notwithstanding the Lower Court's characterization of the Agreement's Arbitration clause.

On April 17, 1997, the Superior Court of New Jersey, Appellate Division, issued its Opinion denying Commerce Bank's request to set aside the Arbitration Award and denying DiMaria's request for attorneys' fees.

(App., *infra*, 18a-45a). The Appellate Division never addressed the denial of access to the Courts because it believed the decision to refer the matter to the arbitration panel was correct.

On May 19, 1997, Commerce Bank filed a Petition for Certification of Review of the Final Judgment with the Supreme Court of New Jersey. On June 30, 1997, the Supreme Court of New Jersey denied that request without opinion. (App., *infra*, 46a).

REASONS FOR GRANTING THE PETITION

The limit of when a state court may force a litigant to try a matter before an arbitration panel must be set. Due process is denied when the contract does not clearly and unmistakably evidence that the arbitrators will decide arbitrability, and the state court allows the arbitration panel to do so. This is particularly onerous in

New Jersey where the arbitrators not only do not have to follow New Jersey law, but do not have to follow any law at all. *Commerce Bank, N.A. v. DiMaria Construction, Inc.*, 300 N.J. Super. 9, 19, 692 A.2d 54, 59 (1997). In *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 115 S.Ct. 1920 (1995), this Court held that arbitratability is to be decided by the court unless the parties explicitly agreed otherwise. This reasoning must be extended to preclude the state from denying access to the courts by referring all issues to arbitration.

I. The Conditions Precedent Issue Should Never Have Been Submitted to the Arbitrators .

The parties' agreement explicitly provided that a decision by the Architect was a condition precedent to an arbitration proceeding. There was never any question that no decision was made by the Architect, because no claim was submitted by DiMaria to the Architect. As such, the arbitration panel was never empowered to

decide anything because the conditions leading to its existence had not been met.

"Courts should not assume that the parties agreed to arbitrate arbitrability unless there is 'clear and unmistakable' evidence that they did so." *First Options, supra.* at 944. Upon reviewing this agreement, there is no clear and unmistakable evidence that the parties agreed that arbitrability would be decided by the arbitrators. On the contrary, the agreement explicitly sets out that before there is to be any arbitration, conditions precedent, i.e. submission of a claim to the Architect, must be met.

Since the parties did not agree to submit the arbitrability issue to arbitration:

> ...then the court should decide that question just as it would decide any other question that the parties did not submit to arbitration, namely independently. These two answers flow inexorably from the

> fact that arbitration is simply a matter of contract between the parties; it is a way to resolve those disputes -- but only those disputes -- that the parties have agreed to submit to arbitration.

First Options, *supra.* at 943.

As such, it was error for the New Jersey courts to allow the conditions precedent argument to be decided by the arbitration panel, when the arbitration panel should never have been convened.

II. Petitioner Was Denied Access to the Courts When the State Court Forced it to have its Case Decided by an Improperly Convened Arbitration Panel.

Once DiMaria requested that an arbitration begin, Commerce Bank was left with two choices. It could proceed with an arbitration that it believed was illegally impaneled, or as it did in this case, it could turn to the New Jersey courts to stop the illegal proceeding. If Commerce Bank had not attempted to stop the arbitration, the panel had the ability to render a verdict

against Commerce Bank that could later be enforced leading to a loss of its property. In order to prevent the loss of its property by an illegal arbitration panel, Commerce Bank turned to the courts. The New Jersey court system, however, failed to decide the arbitrability issue, thereby denying Commerce Bank its access to the courts and affording it protection of its property.

"The fundamental requisite of due process of law is the opportunity to be heard." *Grannis v. Ordean*, 234 U.S. 385, 394, 34 S.Ct. 779, 783 (1914). Commerce Bank was not heard on its condition precedent issue. In spite of no clear agreement that this would be decided by the arbitrators, the court refused to hear the issue and sent it to arbitration. This made the condition precedent agreement useless because the arbitration panel not only was not bound by New Jersey law, but was bound by no

law at all. As a result, the condition precedent to arbitration was rendered meaningless.

The enormity of this problem is demonstrated by the outrageousness of the ultimate result. The arbitration panel that never should have been in place rendered an award not sanctioned or contemplated under New Jersey law. The panel ignored the condition precedent issue and awarded unforeseeable, tort type damages in a contract case, attorneys' fees in violation of the American rule, and interest at a rate above the legal amount. Commerce Bank's loss of property was in complete contravention of its constitutionally protected right to due process of law and an opportunity to be heard.

"Many controversies have raged about the cryptic and abstract words of the Due Process Clause but there can be no doubt that at a minimum they require that

deprivation of life, liberty, or property by adjudication be proceeded by notice and opportunity for hearing appropriate to the nature of the case." *Mullane v. Central Hanover Bank and Trust Company*, 339 U.S. 306, 313, 70 S.Ct. 652, 656 (1950). The appropriate hearing in this matter was for the court to determine whether the condition precedent for arbitration had been met. Simply referring the case to an arbitration panel that is not bound by the law, is not an appropriate hearing. That arbitration panel should never had been impaneled and Commerce Bank should have been protected by the courts.

III. The Question Presented is Important

The courts have recognized an increased reliance on arbitration to resolve disputes:

> Judicial attitudes about arbitration have changed significantly. Although originally there was mistrust of the arbitral process, that attitude

has been replaced by a strong judicial commitment to arbitration. In *Southland Corp. v. Keating*, 465 U.S. 1, 13-14, 104 S.Ct. 852, 859-60, 79 L. Ed. at 1, 13-14 (1984), Chief Justice Burger traced the historic reluctance of the courts to support arbitration to the ancient antipathy between equity and specific performance of arbitration agreements. That reluctance has been all but swept away by judicial recognition that the mindless jealousy of the English courts for their own jurisdiction must yield to the needs of a modern society to develop desirable alternatives to litigation. Our guiding principles should strengthen the systems that encourage those alternatives to litigation, not weaken them. *See, Sanford M. Jaffe & Linda Stamato, "Dispute Resolution: Complementary Programs and the Courts"*, 13 (Jan. 1983) (unpublished paper available from the Administrative Office of the Courts).

Perini Corp. v. Greate Bay Hotel & Casino, Inc., 129 N.J. 479, 489, 610 A.2d 364, 369 (1992).

The strength of the judicial commitment to arbitration is now being tested. If the courts allow arbitration to become an unpredictable process, parties will not insert arbitration clauses in contracts and will rely solely on the courts. Would any business person have predicted upon reading the contract in the case that the arbitration panel itself would decide if it should proceed with the case, and in doing so, it was not bound by any law?

Commerce Bank was improperly deprived of its property. This Court must now send the signal to the states that they cannot refer a matter to an arbitration panel without clear evidence that the parties agreed to do so. If this message is not sent, arbitration will become

such an unstable process that contracting parties will be reluctant to support it.

CONCLUSION

The Petition for Writ of Certiorari should be granted.

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DATED: September 29, 1997

In the
SUPREME COURT OF THE UNITED STATES

October Term, 1997

Commerce Bank, N.A., *Petitioner*,

v.

DiMaria Construction, Inc., *Respondent.*

On Petition for a Writ of Certiorari to the
Superior Court of New Jersey, Appellate Division

APPENDIX TO PETITIONER COMMERCE BANK, N.A.'S PETITION FOR A WRIT OF CERTIORARI

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[DECISION BY THE TRIAL COURT]

THE COURT: Okay. All right. This is, I guess, a return date of an order to show cause to enjoin arbitration and make a determination that conditions precedent to preserving certain claims by the contractor, DiMaria, have not been met and therefore the arbitration should not go forward. And it's also a motion to stay the arbitration proceeding. And then there is what may be considered a cross motion on behalf of DiMaria to dismiss the complaint filed by Commerce Bank.

The parties in December of 1993 entered into two construction contracts in which DiMaria acted as a general contractor on space being leased by the plaintiff, Commerce Bank. As I understand it, the two contracts involved DiMaria doing interior fit out for office space,

and the second contract involved DiMaria installing the HVAC system.

The interior fit out contract involved four phases. The original date of completion was 3/28/94, and thereafter that was extended by change orders. On April the 14th, 1994, the architect of record advised DiMaria that it was in material breach by having failed to complete phase one of the contract, and therefore terminated DiMaria from the contract.

Thereafter, DiMaria filed a demand for arbitration pursuant to the arbitration provision of the contract, the demand for arbitration being filed on 10/21/94, and Commerce filed an answer on 11/14/94.

While the arbitration was pending, on January the 20th, 1995, Commerce filed a verified complaint for declaratory judgment and injunctive relief. In conjunction with that filing, Commerce filed an order to

show cause seeking temporary restraints to enjoin the arbitration proceeding from going forward involving the dispute between it and DiMaria. The application for the temporary restraints was denied by myself on January the 20th, 1995.

I did, however, set the return date of actually May the 10th, today's date, for the issue to show cause as to why the injunction should not issue. On February 9th, 1995, Commerce filed a first amended complaint adding three counts to its initial verified complaint. And on February the 15th, Commerce filed a notice of motion to renew its application to stay the arbitration proceedings.

It's my understanding from the submissions of the parties that the arbitration is scheduled to commence on March the 13th. There were several preliminary arbitration proceedings that took place. DiMaria has now filed a cross motion to dismiss Commerce's first

amended complaint and the matter has come before the Court.

Commerce's complaint encompasses five counts. Count 1 says that the condition precedent for the presentation of a claim had not been met, and the bank is not contractually obligated to proceed with the claim in binding arbitration. Count 2 states that 21 days after the occurrence, there was a failure to present the claim of DiMaria in that timely fashion, and therefore arbitration should not proceed.

Count 3 is that the action by DiMaria in filing the construction lien claim constitutes an irrevocable election of remedies precluding arbitration. Count 4 states that by filing the lien claim, DiMaria is collaterally estopped from proceeding to arbitration. And Count 5 states that by filing the lien claim – the filing of the lien

claim was wrongful, and its failure to discharge the lien claim has caused damages to the bank.

The starting point for the Court is the arbitration clause, and as I have, I believe, made clear in my discussions on this issue with counsel, I consider this to be the broadest, most universal form of arbitration clause. For the record, the clause is set forth in the contract at 4.5.1: Any controversy or claim arising out of or related to this contract or breach thereof shall be settled by arbitration, in accordance with the construction industry arbitration rules of the American Arbitration Association, and judgment upon the award rendered by the arbitrator or arbitrators may be entered in any court having jurisdiction thereof.

I think the operative words in this is any controversy or claim. That means any dispute. I don't think you can get broader than that. Related to the

contract shall be settled by arbitration. The parties have agreed between themselves that any disputes regarding this contract shall be submitted to arbitration.

The bank places heavy emphasis on the Moriah Construction Company vs. Wayne Township case, cited at 98 N.J. Super. 570, the Appellate Division 1968 case. However, I find that case clearly distinguishable because the Court emphasized that it was dealing with a very restrictive arbitration clause in that contract, and the Court, as I indicated in my discussions with Mr. Hinlicky, pointed out at page 576 of its decision that this contract is not the normal one in the commercial setting. And the normal contract in the commercial setting is one of great universality in which all disputes are resolved in arbitration.

I find that the arbitration clause at issue in this particular case is one of great universality, and that the

parties have bargained that all disputes and controversies arising out of or related to the contract are to be decided by the arbitrators. So whether or not conditions precedent have or have not been met, the impact of that on whether or not Mr. DiMaria is entitled to present these claims are issues to be decided by the arbitrators.

Therefore, I will not stay the arbitration proceeding. I will direct that it proceed forthwith. I will dismiss Counts 1 and Counts 2 of the plaintiff's complaint because I believe that those matters are arbitrable issues, not issues to be decided by the Court. With respect to Counts 3 and Counts 4, they are in essence claims of estoppel or election of remedies. I will dismiss those as well based upon Rule – the arbitration clause in which the parties agreed to submit all matters to arbitration, as well as the recently decided

Wasserstein vs. Kavatch case at 261 N.J. Super 277, Appellate Division 1993 case, in which the Court in essence says that you can proceed down two different tracks, and until there's a decision rendered in one of the forums, there hasn't been an irrevocable election of remedies.

I pause at Count 5 because this is early in the proceedings and there may be some way in which DiMaria, having filed the lien claim and having presented – having filed it with Burlington County Court, may have caused the bank some damages. May or may not. Quite frankly, having to proceed to arbitration, I don't view as one of those types of damages. However, at this point in the case, I will allow the bank to preserve that claim, to present to the Court or through discovery what it believes are those – how it was damaged by DiMaria having filed

that lien claim. I will stay discovery on that, however, until the arbitration is completed.

MR. MEDOWAY: Your Honor, may I, just for a moment? On Count 5, paragraph 36, where Commerce Bank seeks as part of its damages any attorneys fees and costs incurred in defending the arbitration proceeding, may that be dismissed, that count? That's Count 36.

THE COURT: Well, that's not properly before me. If you want to make a – if you're going to make applications to dismiss specific counts, then you can do it. But I'm not going to go piecemeal through the paragraphs at this stage, Mr. Medoway.

MR. MEDOWAY: Just so I understand, Your Honor, though, the bank is seeking attorneys fees possibly as part of its damages in Count 5 in having to defend the arbitration proceeding. Given Counts 1

through 4 have been dismissed, I would think that claim also would be dismissed.

THE COURT: Well, they have to proceed to arbitration. I'm ruling against them on Counts 1 through 4.

MR. MEDOWAY: Right. But they would not be entitled to attorneys fees, which is part of their Count 5 claim for relief.

THE COURT: Well, you make a separate application and I'll entertain it. I'll give everybody the opportunity to set forth any arguments they have.

MR. MEDOWAY: Thank you, Your Honor.

MR. HINLICKY: Your Honor, is that application going to be made during the stay of discovery, or are we going to at least have an opportunity to have discovery before such –

THE COURT: I don't know. If he – Mr. Medoway can make it. It may not require any discovery on that particular – I don't think it does, but if you can – I'm not foreclosing Mr. Medoway from making or yourself from making any legal arguments that you wish to make. Some may need discovery, some may not. I may decide that it needs discovery, just like on zany other applications. Some – many summary judgment applications, the Court says, hey, we need some discovery on this.

MR. HINLICKY: It's clearly – all right.

THE COURT: So the case will proceed forthwith to arbitration. Insofar as Mr. Medoway's application that Mr. DiMaria be awarded counsel fees for this filing, I am not denying that at this time. We'll wait, see how Count 5 develops. I suppose you'll be taking Mr. Beck's deposition and maybe Mr. Hinlicky's deposition,

and we'll see what the bank officers knew and when they knew about it, in terms of when they cut the checks and what the people of Burlington County said, and we'll see where that all shakes out.

MR. MEDOWAY: Thank you.

AMERICAN ARBITRATION ASSOCIATION
Construction Arbitration Tribunal

In the Matter of the Arbitration between

Re: 18 110 00361 94
DIMARIA CONSTRUCTION, INC.
VS.
COMMERCE BANK, N.A.

AWARD OF THE ARBITRATORS

We, THE UNDERSIGNED ARBITRATORS, having been designated in accordance with the arbitration agreement entered into by the above-named parties, and dated December 1, 1993, and having been duly sworn and having duly heard the proofs and allegations of the parties, FIND, as follows:

A. It is the opinion of the Tribunal that this contract was ended in a wrongful manner by COMMERCE BANK, N.A., hereinafter referred to as RESPONDENT. As a

result of this wrongful dismissal the Contractor of record "DI MARIA CONSTRUCTION, INC.", hereinafter referred to as CLAIMANT, was harmed in a number of ways. Primarily they were placed in a position where other contracts were unavailable due to a lack of bonding ability and a lack of funds necessary to purchase material. Other harms were the loss of faith by subcontractors and material suppliers and the damage to the Corporate name relative to non-payment and suits against CLAIMANT by others related to this project.

B. This Tribunal has found that conditions precedent were not a factor in this case and therefore did not prevent the case from proceeding to a decision.

C. This Tribunal finds that the dismissal and ultimate arbitration case were wrongful to the CLAIMANT. It is the opinion of this Tribunal that this action and all subsequent actions by RESPONDENT against CLAIMANT

were done without concern for the damage to CLAIMANT. In this same regard these actions were not consistent with the legal requirements for this panel to entertain a ruling of Punitive Damages.

We therefore AWARD as follows:

1. It is the decision of this Tribunal that RESPONDENT shall pay to CLAIMANT the sum of TWO HUNDRED FIVE THOUSAND TWO HUNDRED SEVENTY DOLLARS ($205,270.00) for the Interior Fit Out contract. This sum includes Phases 1 thru 4 work on the fit out, the HAVC contract, the credits for Phases 2, 3 and 4, the credits for the HAVC work and the INTEREST for the period up to this date.

2. It is the decision of this Tribunal that RESPONDENT shall pay to CLAIMANT the sum of FORTY NINE THOUSAND SIX HUNDRED FIFTY DOLLARS

($49,650.00) as a result of the damages suffered by CLAIMANT related to all other contractual topics.

3. The Counterclaim of RESPONDENT against CLAIMANT is hereby DENIED in its entirety.

4. The administrative fees and expenses of the American Arbitration Association shall be borne solely by RESPONDENT and shall be paid as directed by the Association.

5. The compensation and expenses of the arbitrators shall be borne solely by RESPONDENT and shall be paid as directed by the Association.

6. It is the decision of this Tribunal that RESPONDENT shall pay to CLAIMANT the sum of all costs paid to Beskin & Pesciotta, ONE THOUSAND TWO HUNDRED NINETY DOLLARS ($1,290.00) and Archer and Greiner, SIXTY EIGHT THOUSAND TWO HUNDRED

SIXTY FOUR DOLLARS AND SIXTY SIX CENTS ($68,264.66) relative to this case.

7. The above amounts shall be due to CLAIMANT upon notice and receipt of this signed Award. INTEREST shall be applied at the rate of TEN (10%) PERCENT until such time as the Award is paid in full.

8. This Award is in full settlement of all Claims and Counterclaims submitted to this arbitration.

/s/
Arthur Lutzker

/s/
Richard J. Casey, Esq.

/s/
George M. Lobman

300N.J. Super.9

692 A.2d 54

COMMERCE BANK, N.A., Plaintiff-Appellant-Cross-Respondent,
v.
DiMARIA CONSTRUCTION, INC.
Defendant-Respondent-Cross-Appellant (Two Cases).

Superior Court of New Jersey,
Appellate Division.

Argued Jan. 29, 1997.
Decided April 17, 1997.

Joseph H. Blum, Philadelphia, PA, argued the cause for appellant-cross-respondent (Frey, Petrakis, Deeb, & Blum, attorneys; Mr. Blum, Norman W. Briggs, Bakersfield, CA and William B. Jameson, on the brief).

Ellis I. Medoway, Haddonfield, argued the cause for respondent-cross appellant (Archer & Greiner, attorneys; Mr. Medoway, on the brief).

Before Judges LONG, SKILLMAN and CUFF.

The opinion of the court was delivered by

SKILLMAN, J.A.D.

This appeal requires us to consider the principles which govern the determination of whether a court of arbitrators should decide questions regarding the timeliness of a demand for arbitration or the satisfaction of other conditions of arbitration.

In December of 2993, defendant DiMaria Construction, Inc. (DiMaria) entered into two contracts with plaintiff Commerce Bank, N.A. (Commerce) to supervise and manage the construction of interior offices and the installation of heating and air conditioning units in Commerce's commercial office building in Mount Laurel Township. Each contract included a schedule for the completion of construction. On April 14, 1994,

Commerce sent a notice to DiMaria terminating both contracts on the ground that DiMaria had breached the interior office contract by failing to complete construction in a timely manner.

During the following months, the parties exchanged correspondence regarding the termination of the contracts. When the parties were unable to settle their dispute, DiMaria submitted a demand for arbitration on October 21, 1994. Commerce then filed the first of the two actions involved in this appeal, seeking to enjoin the arbitration on the ground that DiMaria had failed to satisfy two conditions precedent to the right to arbitrate, namely filing a claim within twenty-one days of the "occurrence" giving rise to its claim and obtaining a decision from the project architect. DiMaria responded by filing a motion to dismiss and a cross-

motion for counsel fees. The trial court denied Commerce's application to enjoin the arbitration and dismissed the counts of the complaint implicated in this appeal. (FN1) The trial court concluded that under the arbitration clause contained in both contracts the arbitrators had the responsibility to pass upon Commerce's contention that DiMaria failed to satisfy the conditions precedent to arbitration. The court also denied DiMaria's application for counsel fees.

The arbitrators conducted hearings on twenty-two days over a six month period. Following the testimony of eleven witnesses and the introduction of more than 230 exhibits, the arbitrators rendered a decision, which concluded:

A. It is the opinion of the Tribunal that this contract was ended in a wrongful manner by Commerce Bank, N.A.,...As a result of this wrongful dismissal the Contractor of record "DiMaria Construction, Inc.",... was harmed in a number of ways. Primarily they were placed in a position where other contracts were unavailable due to a lack of bonding ability and a lack of funds necessary to purchase material. Other harms were the loss of faith by subcontractors and material suppliers and the damage to the Corporate name relative to non-payment and suits against [DiMaria] by others related to this project.

B. This tribunal has found that conditions precedent were not a factor in this case and therefore did not prevent the case from proceeding to a decision.

Accordingly, the arbitrators awarded Di Maria $205,270 for the interior office and HVAC contracts, $49,650. "related to all other contractual topics" and $69,554.66 for counsel fees.

Following the award, Commerce filed its second action, which sought to vacate the arbitration award on the ground that it was the product of "fraud, corruption or similar wrongdoing," and DiMaria filed a counterclaim seeking confirmation. The trial court rejected Commerce's challenge and confirmed the arbitration award. The court also denied Di Maria's application for counsel fees.

Commerce filed separate appeals from the dismissal of its actions seeking to enjoin the arbitration hearing and to vacate the arbitration award. DiMaria

filed cross appeals from the denial of its claims for counsel fees. We consolidated the appeals.

[1][2] On the appeal from the dismissal of its action seeking to enjoin arbitration, Commerce argues that the trial court erred in concluding that the arbitration clause in the contracts conferred responsibility upon the arbitrators to determine whether Di Maria satisfied the conditions precedent to arbitration. (FN2) Commerce relies upon cases such as *Jersey Cent. Power & Light co. v. Local Union No. 1289 of Int'l Bhd. Of Elect. Workers*, 38 N.J. 95, 102-03, 183 A.2d 41 (1962) and *Laborers' Local Union Nos.* 472 & 172 v. *Interstate Curb & Sidewalk*, 90 N.J. 456, 463, 448 A. 2d 980 (1982), which hold that a court ordinarily must make the threshold determination whether the parties to a contract have agreed to submit a particular dispute to arbitration. The rationale for this

rule is that because a party may be compelled to submit a dispute to arbitration only if it has agreed to this alternative form of dispute resolution, the question whether a contract requires a particular dispute to be submitted to arbitration – sometimes referred to as "substantive arbitrability," *Standard Motor Freight, Inc. v. Local Union No.* 560, *Int's Bhd. of Teamsters*, 49 N.J. 83, 96, 228 A.2d 329 (1967)—is "an issue for judicial determination." *AT & T Techs., Inc. v. Communications Workers of Am.*, 475 U.S. 643, 649, 106 S.Ct. 1415, 1418, 89 *L.Ed.*2d 648, 656 (1986). Consequently, arbitrators may decide whether a particular dispute is within the scope of the parties' agreement to arbitrate only if "an express contract provision" confers such authority. *Laborers' Local Union Nos. 472 & 172 v. Interstate Curb & Sidewalk, supra*, 90 N.J. at 463, 448 A.2d 980; *see also First Options of Chicago, Inc. v.*

Kaplan, 514 U.S. 938, ------, 115 S.Ct. 1920, 1924, 131 L.Ed.2d 985, 994 (1995) ("Courts should not assume that the parties agreed to arbitrate arbitrability unless there is 'clea[r] and unmistakabl[e]' evidence that they did so," (quoting *AT & T Techs., Inc. v. Communications Workers of Am., supra*, 475 U.S. at 649, 106 S.Ct. at 1418-19, 89 L.Ed.2d at 656)).

[3] [4] [5] However, once it is decided that the subject of a particular dispute is within the scope of an agreement to arbitrate, any question as to whether a party has satisfied the procedural preconditions of arbitration, such as the timeliness of a demand for arbitration, -- sometimes referred to as a question of "procedural arbitrability," *Standard Motor Freight, Inc. v. Local Union No.560 Int'l Bhd. of Teamsters, supra*, 49 N.J. at 97, 228 A.2d 329—generally should be decided by

arbitrators rather than a court. *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543, 555-59, 84 S.Ct. 909, 917-19, 11 L.Ed.2d 898 (1964); *Paine Weber, Inc. v. Elahi*, 87 F.3d 589 (1st Cir.1996); *Conticommodity Servs., Inc. v. Philipp & Lion*, 613 F.2d 1222, 1224-27 (2nd Cir. 1980); *Enertron Indus., Inc. v. Mack*, 242 N.J. Super. 83, 94 n. 3, 576 A.2d 28 (App.Div.1990); *D'Arrigo v. New Jersey State Bd. of Mediation*, 228 N.J. Super. 189, 196, 549 A.2d 451 (App.Div.1988), *rev'd on other grounds*, 119 N.J. 74, 574 A.2d 44 (1990); *Mahony-Troast Constr. Co. v. Supermarkets Gen. Corp.*, 189 *N.J. Super.* 325, 331, 460 A.2d 149 (App.Div. 1983). The essential rationale for this rule is that "where the parties have clearly agreed to arbitrate the subject of the underlying dispute between them, ...it is unlikely that they intended other issues related to the dispute, such as the timeliness of the submission of the claim, to affect the 'arbitrability' of the

dispute." *Paine Webber, Inc. v. Elahi, supra*, 87 F.3d at 599. Moreover, " 'the fact that something is a condition precedent to arbitration does not make it any less a procedural question' to be determined by the arbitrator." *Id.* at 600-01 n. 12 (quoting *Local 285, Serv. Employees Int'l Union, AFL-CIO v. Nonotuck Resource Assocs.*, 64 f.3D 735, 740 (1ST Cir. 1995)). Therefore, unless the contract expresses a contrary intent, the presumption is that parties intend such procedural questions to be decided by the arbitrator. *Id.* at 598-99.

We recognize that this court held in *Moreira Constr. Co. v. Township of Wayne*, 98 *N.J. Super.* 570, 238 A.2d 185 (App.Div.), *certif. denied*, 51 *N.J.* 467, 242 A.2d 15 (1968), that a trial court should decide whether a party demanded arbitration within the time required by the contract. However, the arbitration clause involved in

Moreira conferred only limited powers upon the arbitrator; only one party to the contract could invoke arbitration and even that party's right to arbitrate "rested on a carefully circumscribed set of conditions." *Id.* at 576, 283 A.2d 185. We contrasted this narrow arbitration clause with "[c]lauses of that universality of coverage...common in commercial agreements." *Ibid.* Consequently, *Moreira* is consistent with our more recent decisions which hold that, absent an expression of contrary intent in the contract, any question whether a party has made a timely demand for arbitration should be decided by arbitrators rather than by a court. *See Enertron Indus., Inc. v. Mack*, supra; *D'Arrigo v. New jersey State Bd. Of Mediation*, supra, *Mahony-Troast Constr. Co. v. Supermarkets Gen. Corp., supra;* but cf. *Brick Township Mun. Utils. Auth. V. Diversified R.B. & T.*

Constr. Co., 171 *N.J. Super.* 397, 402-04, 409 A.2d 806 (App.Div.1979).

In its action to enjoin the arbitration, Commerce argued that DiMaria was barred from arbitrating any claim relating to the termination of the contracts because it did not file a claim with the project architect and failed to seek arbitration within twenty-one days of termination. Commerce relied upon section 4.3.2 of the contracts, which provides in pertinent part:

> Claims, including those alleging an error or omission by the architect, shall be referred initially to the architect for action as provided in Paragraph 4.4. A decision by the architect, as provided in Subparagraph 4.4.4 shall be required as a condition precedent to

> arbitration ...of a claim between the contractor and the owner.

Commerce also relied upon section 4.3.3, which provides:

> Claims by either party must be made within twenty-one (21) days after occurrence of the event giving rise to such claim or within twenty-one (21) days after the claimant first recognizes the condition giving rise to the claim, whichever is later.

The contracts do not expressly indicate whether a dispute relating to a party's compliance with sections 4.3.2 and 4.3.3 should be decided by a court or by arbitrators. Therefore, the arbitrability of such a dispute

requires reference to the general arbitration clause of the contracts, which provides that:

> Any Controversy or Claim arising out of or related to the Contract, or the breach thereof, shall be settled by arbitration in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association.

Because the dispute as to whether DiMaria complied with sections 4.3.2 and 4.3.3 relates to procedural preconditions of arbitration, we must construe this arbitration clause in light of the presumption that parties to a contract providing for arbitration intend the arbitrators to decide such

procedural questions. *See Paine Webber, Inc. V. Elahi, Supra.* 87 F.3 at 598-99.

The arbitration clause requires the submission to arbitration of not only "any claim" but also "[a]ny controversy ... arising out of or related to the Contract, or the breach thereof." The term "any controversy" is ordinarily understood as having a broader meaning than simply "any claim" and to include any dispute between the parties relating to the contract. *See Wojcik v. Aetna Life Ins. & Annuities Co.*, 916 *F.Supp.* 729, 732 (N.D.Ill. 1996); *see also USX Corp. v. West*, 781 S.W. 2d 453, 455-56 (Tex.Ct.App.1989). This expansive view of the meaning of "any controversy" is reinforced by the fact that the arbitration clause involved in this case applies to any controversy "related to" the contract or any alleged breach. This reading of the arbitration clause also

furthers this State's strong policy of minimizing the role of courts in the arbitration process. See *Tretina Printing, Inc. v. Fitzpatrick & Assoc., Inc.* 135 N.J. 349, 640 A.2d 788 (1994). Consequently, we conclude that parties' dispute as to whether DiMaria satisfied the procedural preconditions of arbitration of its claim arising out of Commerce's alleged breach of the contract constituted a "controversy...related to the Contract, or a breach thereof."

This conclusion is directly supported by *Board of Library Trustees, Shaker Heights Pub. Library v. Ozanne Constr. Co.* 100 *Ohio App.* 3d 26, 651 N.E.2d 1356 (1995), which involved the same standard form construction contact entered into between Commerce and DiMaria. In *Ozzanne*, the owner of a building refused to arbitrate a contractor's claims on the ground

that the contractor had failed to give the architect timely notice of those claims. However, the court characterized the arbitration clause of the contract, which was identical to the one involved in this case, as "extremely broad and unlimited as to the nature of disputes that are subject to arbitration" *Id.* at 1358. In view of the strong presumption in favor of arbitrability, the court concluded that "[I]t cannot be said 'with positive assurance' that the disputes at issue ... did not 'arise out of' or 'are not related to the Contract, or the breach thereof'" *Ibid.* Similarly, the trial court correctly construed the general arbitration clause in the contracts between Commerce and Di Maria to require the arbitrators to decide whether DiMaria was foreclosed from arbitrating because it did not file a claim with the architect or demand arbitration within twenty-one days of termination of the contracts.

II

[6] On the appeal from the judgment confirming the arbitration award, Commerce argues that the award is "so outrageous" that it had to have resulted from "fraud, corruption of similar wrongdoing." In particular, Commerce attacks the award of $69,554.66 for the counsel fees incurred in the proceedings and $49,650 for "all other contractual topics," such as lost profits on other contracts DiMaria was unable to secure due to a loss of bonding capacity, lack of capital required to purchase materials and damage to its corporate name. Commerce also attacks the requirement that it pay 10% interest on the amount of the award until it is paid in full.

Even if Commerce' attack upon the arbitration award would have been maintainable under prior New Jersey law, *see Perini v. Greate Bay Hotel & Casino, Inc.*, 129 N.J. 479, 496, 610 A.2d 364 (1992), it is clearly without merit under the standard of judicial review endorsed in *Tretina Printing Inc. v. Fitzpatrick & Assocs. Inc.*, *supra*, 135 N.J. at 349, 640 A.2d 788. In *Tretina*, the Court held, quoting Chief Justice Wilentz' concurrence in *Perini*, that "[b]asically, arbitration awards may be vacated only for fraud, corruption, or similar wrongdoing on the part of the arbitrators." *Id.* at 358, 640 A.22d 788. Chief Justice Wilentz' concurrence clearly states that a court should confirm an arbitration award even though the award is not based on the principles of law which would be applied in the courts of New Jersey or any other jurisdiction:

The very purpose of committing a dispute to arbitration is to get away from the judiciary, to get away from the strictures and limitations of law,...

. . . . .

[I]f nothing is said in the agreement, the arbitrators may use any standards they want to reach a just and equitable result, unrestricted by any law or laws, required only to be honest and to attempt to the best of their ability, based on their knowledge and experience to achieve a just and equitable result.

[*Perini v. Greate Bay Hotel & Casino, Inc.*, *supra*, 129 N.J. at 542-43, 610 A.2d 364.]

Commerce argues that the award of counsel fees was improper because it was contrary to "[t]he traditional American Rule...that attorneys fees are not awardable to the winning party unless statutorily or contractually authorized." Similarly, Commerce argues that the award for lost profits due to DiMaria's loss of bonding capacity, lack of capital required to purchase materials, and damage to its corporate name, violated the rule of *Hadley v. Baxendale*,, 9 Ex. 341, 145 *Eng. Rep.* 145 (1854) that damages for breach of a contract are limited to those losses which would have been reasonable foreseeable by the parties as a probable result of a breach.

However, under the *Perini* concurrence endorsed in *Tretina*, arbitrators have no obligation to follow the principles of law which would govern an action in a court of law. Instead, arbitrators may conclude that the only way to provide complete relief for a breach of contract – the only way to actually put the injured party in as good a position as it would have been in if the contract had not been breached, *see Donovan v. Bachstadt*, 91 N.J. 434, 444, 453 A.2d 160 (1982) – is to award any counsel fees which had to be incurred to prove the breach as well as lost profits that were beyond the parties' contemplation at the time of execution of the contract. In fact, Chief Justice Wilentz' concurrence in *Perini* specifically criticized the plurality opinion's recourse to *Hadley v. Baxendale* in reviewing the arbitration award involved in that case. 192 N.J. at 547, 610, A.2d 364. The arbitrators also could have concluded that to prevent

any further damage to DiMaria's business due to the lack of adequate operating capital, it would be "just and equitable" to encourage Commerce to pay the arbitration award promptly by requiring it to pay interest on the award at a rate in excess of the prevailing market rate. Therefore, even if we were to accept the underlying premise of Commerce's argument— that a court could infer that an arbitration award was the product of fraud, corruption or similar wrongdoing based solely on its manifest excessiveness and unfairness – Commerce's presentation falls far short of what would be required to vacate an arbitration award under this theory.

III

[7] On it cross appeal, DiMaria argues that the trial courts in both actions erred in denying its cousel fee

applications. In support of its applications, DiMaria relied upon the Frivolous Litigation Act, which provides in pertinent part that "[a] party who prevails in a civil action, ...may be awarded all reasonable litigation costs and reasonable attorney fees, if the judge finds ... that a complaint, counter-claim, cross-claim or defense of the nonprevailing person was frivolous." N.J.S.A. 2A:15-59.1(a). A claim or defense may be found to be frivolous only if it was asserted "in bad faith, solely for the purpose of harassment, delay or malicious injury" or if, the losing party knew or should have known that the action was "without any reasonable basis in law or equity" and "could not be supported by a good faith argument for an extension, modification or reversal of existing law." N.J.S.A. 2A:15-59.1(b)(1),(2). Our Supreme Court has concluded that the Legislature intended the term "frivolous" to be "given a restrictive interpretation."

McKeown-Brand v. Trump Castle Hotel & Casino, 132 N.J. 546, 561, 626 A.2d 425 (1993).

We are satisfied that neither of Commerce's actions was frivolous within the intent of N.J.S.A. 2A:15-59.1. Although we have concluded that the question whether DiMaria complied with the procedural preconditions of arbitration was within the arbitrator's authority to decide, there is case law in New Jersey supporting the contrary view. *See e.g., Moreira Constr. Co. v. Township of Wayne, supra, 98 N.J. Super. 570, 238 A.2d* 185; *Brick Township Mun. Utils. Auth. V. Diversified R.B. & T. Constr. Co., supra*, 171 N.J. Super. 397, 409 A.2d 806. Moreover, the more recent decisions of this court, which hold that arbitrators rather than a court should decide whether a party has made a timely demand for arbitration, do not contain extensive discussion, *see, e.g.,*

Enertron Indus. Inc. v. Mack, supra. 242 N.J. Super. 83, 576 A.2d 28; *D'Arrigo v. New Jersey State Bd. of Mediation, supra., 228 N.J. Super.* 189, 549 A.2d 451; *Mahony-Troast Constr. Co. v. Supermarkets Gen. Corp., supra,* 189 N.J. Super. 325, 460 A.2d 149, and there is no decision of the Supreme Court of New Jersey which addresses the point. Therefore, there was no definitive statement of law contrary to the position Commerce advanced in its action to enjoin the arbitration proceedings.

Although we are satisfied for the reasons set forth in section II of this opinion that the position Commerce advanced in its action to vacate the arbitration award was clearly contrary to existing law, an action may be found to be frivolous under N.J.S.A: 2A.15-59.1(b)(1). Therefore, the trial courts in both actions correctly

concluded that DiMaria was not entitled to counsel fees under the Frivolous Litigation Act.

Accordingly, the judgments in both actions are affirmed in all respects.

FN1. Commerce subsequently dismissed the remaining count, relating to counsel fees, without prejudice.

FN2. Commerce also argues that DiMaria waived its right to arbitration because it did not make a demand for arbitration until six months after Commerce's termination of the contract. However, the parties entered into a tolling agreement to preserve their rights to pursue arbitration only six weeks after termination of the contract. Therefore, this argument is clearly without merit. R.2:11-3(e)(1)(E).

697 A.2d 546 (Table)
(Cite as: 151 N.J. 73, 697 A.2d 546)

Commerce Bank, N.A.
v.
DiMaria Construction, Inc.

NO.C-1310 SEPT.TERM 1996

Supreme Court of New Jersey

June 30, 1997

Lower Court Citation or Number: 300 N.J. Super. 9, 692 A.2d 54

Disposition: Denied

(The decision of the Court is referenced in the Atlantic Reporter in a table captioned "Supreme Court of New Jersey Table of Petitions for Certification".)